Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

COMMENTS OF
THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

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EXECUTIVE SUMMARY

The Joint Board's recommendations are generally consistent with the views expressed by ITAA in its comments filed in this proceeding. In those comments, ITAA recommended that the Commission limit the definition of universal service to a core group of basic services, ensure that universal service subsidies are explicit, and generate such subsidies through equitable and nondiscriminatory contributions from all telecommunications common carriers.

Services for Schools and Libraries. In its comments, ITAA expressed concern that using universal service revenues to fund information services -- including Internet access service -- for schools and libraries would exceed the Commission's statutory authority under Section 254(c)(1). The Joint Board, however, has concluded that the Commission has authority to adopt such a program under Section 254(h)(2)(A). If the Commission chooses to do so, it should state expressly that all providers -- whether telecommunications carriers, non-carrier-affiliated enhanced service providers, or other entities -- may receive "support payments" from the universal service funding mechanism.

Private Carrier/Common Carrier Distinction. ITAA supports the Joint Board's recommendation that the Commission impose universal service payment requirements on carriers that provide interstate telecommunications services, but that it not impose such requirements on other providers of telecommunications. ITAA is concerned, however, that the Recommended Decision could be construed to suggest that private carriers are included within the definition of a carrier that provides "telecommunications services." This approach is inconsistent with the framework adopted by Congress, and could undermine the well-established distinction between common carriage and private carriage. Rather than adopting the approach suggested by the Joint

Board, the Commission should clarify that -- under common law principles codified in the Telecommunications Act -- private carriers do not constitute carriers that provide telecommunications services.

Enhanced Service Provider Contributions. ITAA fully supports the Joint Board's conclusion that the Section 254 does not authorize the Commission to require enhanced service providers ("ESPs") and information service providers ("ISPs") to make payments to the universal service support mechanisms. ITAA believes that the only situations that would justify imposition of universal service payment obligations on an entity that provides enhanced services would occur when: (1) a common carrier provides both basic telecommunications and enhanced services and (2) a non-carrier ESP provides a stand-alone telecommunications service to the public for a fee. ITAA respectfully disagrees with the Joint Board's suggestion that "the Commission re-evaluate which services qualify as information services." Rather, the Commission should continue to rely on the well-established basic/enhanced dichotomy, which was established in Computer II and codified in the Telecommunications Act.

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The Information Technology Association of America ("ITAA") hereby submits the following comments regarding the Recommended Decision adopted by the Federal-State Joint Board ("Joint Board").[1]

I. THE JOINT BOARD HAS CREATED A SOUND FOUNDATION FOR THE DEVELOPMENT OF A UNIVERSAL SERVICE PROGRAM

The Joint Board's recommendations are generally consistent with the views expressed by ITAA in its comments filed in this proceeding.[2] In those comments, ITAA recommended that the Commission limit the definition of universal service to a core group of basic services, ensure that universal service subsidies are explicit, and generate such subsidies

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[1] See Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (released Nov. 8, 1996) [hereinafter "Recommended Decision"].

[2] See Joint Comments of the Information Technology Association of America and the Electronic Messaging Association, CC Docket No. 96-45 (filed Apr. 12, 1996) [hereinafter "ITAA Comments"]; Joint Reply Comments of the Information Technology Association of America, the Electronic Messaging Association, the Information Technology Industry Council, the Information Industry Association, and the National Retail Federation, CC Docket No. 96-45 (filed May 7, 1996) [hereinafter "ITAA Reply Comments"].

through equitable and nondiscriminatory contributions from all telecommunications common carriers.

Core Services. Although the Joint Board's list of services to be supported by universal service is somewhat more expansive than the list initially proposed by the Commission, it remains limited to a core of widely subscribed-to basic telecommunications services. The Joint Board has further recommended that the Commission use forward-looking economic costs to determine the level of support that should be provided to eligible telecommunications service providers.[3] Taken together, these recommendations should ensure that the universal service goals established by Congress will be achieved in the most efficient manner.

Equitable and Non-discriminatory Support. In its comments, ITAA stressed the need to ensure that carriers contribute to universal service on a non-discriminatory basis. The Joint Board proposal to require any telecommunications carrier that provides interstate telecommunications services to make contributions to universal service support mechanisms on the basis of that entity's gross telecommunications revenues, less any payments that it makes to other telecommunications carriers, satisfies that criterion.[4]

Elimination of Hidden Subsidies. ITAA fully supports the Joint Board's proposals to eliminate hidden universal service subsidies. In particular, ITAA agrees that, if the Commission concludes that a portion of the cost of the subscriber loop should continue to be

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[3] See Recommended Decision at ¶ 268.

[4] See id. at ¶ 807.

recovered through the common carrier line charge ("CCLC"), the CCLC should be converted to a non-usage-sensitive charge, such as a flat-rate, per-line charge.[5]

II. IF THE COMMISSION ALLOWS SCHOOLS AND LIBRARIES TO OBTAIN SUBSIDIES FOR NON-TELECOMMUNICATIONS SERVICES, THE SUPPORT MECHANISM MUST BE "COMPETITIVELY NEUTRAL"

In its comments, ITAA recognized "the needs of schools, libraries, and other segments of the public for information services."[6] However, ITAA also expressed concern that using universal service revenues to fund information services -- including Internet access service -- would exceed the Commission's authority under Section 254(c)(1), which defines universal service as "an evolving level of telecommunications services."[7]

The Joint Board has recommended that universal service funds be used to allow schools and libraries to obtain Internet access service, inside wiring, and certain forms of CPE at deeply discounted rates.[8] The Joint Board concluded that such a program is permissible under Section 254(h)(2)(A), which authorizes the Commission to "establish competitively neutral rules" that will "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries."[9]

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[5] See id. at ¶¶ 774-76.

[6] ITAA Reply Comments at 9.

[7] Id. at 5-9 (quoting 47 U.S.C. § 254(c)(1) (emphasis added)).

[8] Recommended Decision at ¶¶ 462-63, 473-84.

[9] 47 U.S.C. § 254(h)(2)(A).

If the Commission chooses to adopt the Joint Board's proposal, it must ensure that the support mechanism is "competitively neutral." To fulfill this statutory responsibility, the Commission should state expressly that all providers -- whether telecommunications carriers, non-carrier-affiliated enhanced service providers, or other entities -- may submit competitive bids to provide eligible services and equipment to schools and libraries and, if successful, to receive "support payments" from the universal service funding mechanism.[10]

The Commission also should ensure that telecommunications carriers that participate in this program remain subject to existing rules designed to prevent them from obtaining an unfair competitive advantage in non-telecommunications markets. In particular, the Commission should clarify that such carriers are subject to the current prohibition on bundling regulated telecommunications services with enhanced services.[11] This approach will promote competition, thereby reducing costs and allowing the maximum deployment of services and equipment possible within the $2.25 billion cost "ceiling" recommended by the Joint Board.[12]

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[10] Although the Joint Board appears to endorse this position, the Recommended Decision contains only a few passing references to the participation of non-carriers. See Recommended Decision at ¶ 460 ("[T]he competitively neutral rules contemplated under [Section 254(h)(2)(A)] are applicable to all service providers."); id. at ¶ 484 ("To the extent the Commission exercises authority under Section 254(h)(2) . . . [it] should establish 'competitively neutral rules' which provide support to any provider of internal connections that the school or library selects."); id. at ¶ 613 ("Non-telecommunications carriers providing eligible services to schools and libraries . . . would be entitled . . . to reimbursement from universal service support mechanisms.").

[11] See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, 475 (1980) (subsequent history omitted) [hereinafter "Computer II"].

[12] The same principles should be applied if the Commission decides to subsidize the provision of Internet access or other information services to health care providers.

III. THE COMMISSION SHOULD ADOPT THE JOINT BOARD'S RECOMMENDATION THAT ONLY CARRIERS THAT PROVIDE INTERSTATE TELECOMMUNICATIONS SERVICES BE REQUIRED TO MAKE PAYMENTS TO THE UNIVERSAL SERVICE SUPPORT MECHANISMS

A. "Other Telecommunications Providers" -- Including Private Carriers -- Should Not Be Required to Make Payments to the Universal Service Support Mechanisms

As the Joint Board recognized, the Telecommunications Act requires "carriers that provide interstate telecommunications services" to make payments to the universal service support mechanisms, while providing the Commission with discretion as to whether to impose such obligations on "other provider[s] of interstate telecommunications." ITAA supports the Joint Board's recommendation that the Commission not impose universal service payment requirements on "other providers."[13] ITAA is concerned, however, that the Recommended Decision could be construed to suggest that private carriers are included within the definition of a carrier that provides "telecommunications services." If adopted, such an approach could undermine the well-established distinction between common carriage and private carriage.

The courts have long distinguished between common carriers and private carriers. As the D.C. Circuit explained in the NARUC case, common carriers undertake to "carry for all people indifferently," while private carriers make "individualized decisions, whether and on what terms to deal."[14] Under established law, common carriers are subject to regulation under Title

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[13] Recommended Decision at ¶ 794.

[14] National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640 & 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) [hereinafter "NARUC"]. The D.C. Circuit reiterated this test in the Dark Fiber Appeal. As the court observed:

> Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If

II of the Communications Act; private carriers are not. The Commission has repeatedly recognized this fundamental distinction, and has classified offerings as private carriage when appropriate.[15]

In enacting the Telecommunications Act, Congress "recognize[d] the distinction between common carrier offerings . . . and private services."[16] Congress embodied this distinction in Section 254. That provision carefully differentiates between "telecommunications carriers that provide interstate telecommunications services" and "other provider[s] of interstate telecommunications." The Senate Committee Report expressly noted that "private telecommunications providers" (i.e., private carriers) fall within the latter category.[17]

> the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' . . . the entity is a private carrier . . . and the Commission is not at liberty to subject the entity to regulation as a common carrier.

Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (quoting NARUC, 525 F.2d at 643).

[15] See, e.g., Amendment of the Commission's Rules to Establish Policies Pertaining to a Mobile Satellite Service, 9 FCC Rcd 5936, 6002-2005 (1994) ("Big LEOs" provide space segment capacity on a private carrier basis); Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, 7 FCC Rcd 1630, 1637-38 (IVDS is a private carrier offering); General Telephone Company of the Southwest, 3 FCC Rcd 6778 (1988), aff'd 5 FCC Rcd 1189 (1990) (proposed microwave service constitutes private carriage); Lightnet, File No. W-P-C 5166, FCC 85-276 (May 20, 1985) (proposed fiber optic offering constitutes private carriage).

[16] H.R. Rep. No. 104-204, Part 1, at 126 (1995). Orders issued by the Commission subsequent to enactment of the Telecommunications Act have continued to rely on the NARUC test. See MFS Globenet, 11 FCC Rcd 12,732 (Int'l Bureau 1996); AT&T Submarine Systems, Inc., 11 FCC Rcd 7,033 (Int'l Bureau 1996).

[17] See S. Rep. No. 104-23, at 27-28 (1995) (explaining that the universal service contribution provision of the Senate bill -- which was adopted as new Section 254(d) -- distinguished between "telecommunications carriers" and "private telecommunications providers").

The Recommended Decision appears to be inconsistent with the framework adopted by Congress. Under the Joint Board's proposed approach, an entity apparently would be classified as a carrier that provides interstate telecommunications services unless it either provides telecommunications "that meet the entity's internal needs" or provides telecommunications to others "free-of-charge."[18] This description is so broad that it could sweep virtually all private carriers into the telecommunications services provider category.

The Joint Board based its description of the entities that fall within the definition of a carrier that provides telecommunications services on the Commission's CMRS Order.[19] In that order, the Commission concluded that, pursuant to the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"), certain providers of mobile radio services that had previously been classified as private carriers would be reclassified as commercial mobile radio service ("CMRS") providers and, therefore, would be subject to common carrier regulation.[20] The Joint Board appears to have assumed that the standards adopted by the Commission to determine when a wireless provider constitutes a CMRS provider under OBRA 1993 could be used to determine when any telecommunications provider constitutes a carrier that provides telecommunications services for purposes of Section 254 of the Telecommunications Act.

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[18] Recommended Decision at ¶¶ 784 & 794.

[19] See id. at ¶ 788 (citing CMRS Order, 9 FCC Rcd 1411 (1994)).

[20] CMRS Order, 9 FCC Rcd at 1439 n.130.

The Telecommunications Act, however, did not extend the regulatory regime adopted in OBRA 1993 to all sectors of the telecommunications market.[21] To the contrary, as noted above, the Act codified the traditional common carrier/private carrier distinction articulated by the D.C. Circuit in NARUC. The Commission, therefore, cannot rely on the distinctions established in the CMRS Order. Rather, the Commission should clarify that -- under common law principles codified in the Telecommunications Act -- private carriers do not constitute carriers that provide telecommunications services.

The importance of properly classifying private carriers is not limited to the question of whether the Commission must require these entities to make payments to the universal service funding mechanisms.[22] Under the Telecommunications Act, any entity that

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[21] The two statutes adopted different regulatory regimes in order to achieve fundamentally different purposes. While OBRA 1993 sought to extend Title II regulation in order to ensure that "similar services are accorded similar regulatory treatment," H.R. Conf. Rep. No. 103-213, 494 (1993), the Telecommunications Act establishes a "deregulatory national policy framework," H.R. Conf. Rep. No. 104-458, Preamble (1996). The different approaches in the two Acts are reflected in the different terms used in each statute. Compare 47 U.S.C. 332(d)(1) (emphasis added) (A mobile radio service provider that offers to serve a "substantial portion of the public" can constitute a CMRS provider under OBRA 1993) with id. at §§ 153(44) & 153(46) (An entity does not qualify as a "telecommunications carrier" under the Telecommunications Act unless it effectively offers telecommunications service to "the public."). The Joint Board does not appear to have recognized this distinction. See Recommended Decision at ¶ 788 & n.2529 (quoting the definitional language from OBRA 1993, but citing to the Telecommunications Act).

[22] ITAA recognizes that, because private carriers are "other providers of telecommunications," the Commission has discretion to require these entities to contribute to the universal service fund. Nonetheless, as a matter of policy, ITAA believes that it would be unwise for the Commission to do so. As ITAA explained in its comments, such providers derive little commercial benefit from the promotion of universal service. See ITAA Comments at 18-19. Imposition of universal service contribution requirements on such entities, moreover, would result in significant administrative problems, while generating little additional revenue.

provides telecommunications services "shall be treated as a common carrier."[23] Consequently, classifying private carriers as telecommunications service providers would result in those entities being subject to a wide range of unnecessary and counter-productive regulations at the federal and state level. Whatever else Congress may have intended when it enacted the Telecommunications Act, it plainly did not seek to extend government regulation to entities -- such as private carriers -- that have long participated in the telecommunications market on a non-regulated basis.

B. As the Joint Board Correctly Recognized, the Telecommunications Act Does Not Authorize the Commission to Require ESPs to Make Payments to the Universal Service Support Mechanisms

In the Recommended Decision, the Joint Board concluded that the Telecommunications Act does not authorize the Commission to require enhanced service providers ("ESPs") and information service providers ("ISPs") to make payments to the universal service support mechanisms.[24] ITAA fully supports this conclusion.

The Recommended Decision goes on to state that ESPs or ISPs that provide interstate telecommunications services should be required to make universal service payments "based on the revenues derived from telecommunications services."[25] Although the Joint Board did not elaborate on this point, ITAA believes that there are only two situations that would

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[23] 47 U.S.C. § 153(44).

[24] Recommended Decision at ¶ 790. Of course, while ESPs are not required to make payments to the universal service funding mechanism, as large users of telecommunications services, ESPs contribute to the fund through their payments to interstate telecommunications service providers.

[25] Id.

justify imposition of universal service payment obligations on an entity that provides enhanced services. The most obvious situation would occur when a common carrier provides both basic telecommunications and enhanced services.[26] The second situation would occur when a non-carrier ESP provides a stand-alone telecommunications service to the public for a fee.

The Joint Board also suggested that "the Commission re-evaluate which services qualify as information services" in order to "take into account changes in technology and the regulatory environment."[27] While the Commission must periodically reassess the continued appropriateness of its regulations, there is no apparent need to expend scarce administrative resources to review whether specific services qualify as information services. Indeed, such an approach would be inconsistent with the Commission's decision, in Computer II, to eliminate the need to make time-consuming, individualized assessments of whether a given service is subject to regulation by establishing a dichotomy between regulated basic transmission and non-regulated enhanced services.[28]

The fact that the "regulatory environment" has evolved over time does not provide an adequate basis for revisiting the basic-enhanced dichotomy. To the contrary, the most significant change in the regulatory environment, the adoption of the Telecommunications Act,

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[26] In that case, the carrier should be required to make a payment to the universal service funding mechanisms based on the value of the telecommunications services it provides to its enhanced service operation, just as it would make a contribution based on the revenue received from providing telecommunications services to its non-affiliated ESP customers.

[27] Id.

[28] See Computer II, 77 F.C.C.2d at 425. ("[F]urther attempts to so distinguish enhanced services would be ultimately futile, inconsistent with our statutory mandate and contrary to the public interest.").

has resulted in the codification of the Commission's long-standing regulatory regime. Although the Act uses the terms "telecommunications" and "information services" -- rather than "basic" and "enhanced service" -- nothing in the Act provides a basis for regulatory changes that would subject any service currently classified as enhanced to Title II regulation.[29]

CONCLUSION

The Commission should adopt the Joint Board's recommendations to limit the core universal service program to basic telecommunications services, base funding on the forward-looking incremental cost of providing service, and take actions to eliminate hidden subsidies. In addition, if the Commission decides to allow schools and libraries to obtain Internet and certain other information services at subsidized rates, it must ensure that carrier and non-carrier enhanced service providers have an equal opportunity to provide such services.

As recommended by the Joint Board, the Commission should limit universal service contribution obligations to carriers that provide interstate telecommunications services. The Commission, however, should clarify that private carriers do not constitute "carriers that provide interstate telecommunications services." Finally, as the Joint Board correctly

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[29] Nor do technological advances justify any alteration in the Commission's regulatory regime. The Commission has had no trouble applying its existing framework to new services, such as Internet access service (which is enhanced) and frame relay (which is basic).

recognized, the Telecommunications Act does not authorize the Commission to require ESPs to make payments to the universal service funding mechanisms.

Respectfully submitted.

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